Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

FELIPE SORIANO-ARELLANO

Petitioner,

v.

ERIC H. HOLDER, JR., United States Attorney General,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDICES

Felipe Soriano-Arellano
Petitioner in propia persona

655 S. Flower St., # 362
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QUESTIONS PRESENTED

1) Whether the United States Court of Appeals for the Ninth Circuit drastically deviated from the "equitable tolling doctrine" when it deemed Petitioner's Motion to Reopen untimely filed where Petitioner demonstrates that he had been pursing his rights diligently and that extraordinary circumstances stood in his way.

2) Whether the due process rights of an alien in removal proceedings are violated when the Immigration Judge, the Board of Immigration Appeals and the United States Court of Appeals for the Ninth Circuit fail to review the merits of an alien's claim and abide by the prevailing case law and the legislative intent of the statute.

PARTIES TO PROCEEDING

All parties appear in the caption of the case on the cover page. The Petitioner is Felipe Soriano-Arellano. The Respondent is Eric Holder, Jr. the Attorney General of the United States.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Felipe Soriano-Arellano respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United State Court of Appeals for the Ninth Circuit dismissing the Petition for Review from the denial of Mr. Soriano's Motion to Reopen on November 19, 2009 appears at Appendix A to this petition and is unreported.

The opinion of the Board of Immigration Appeals denying Mr. Soriano's Motion to Reopen on March 4, 2008 appears at Appendix B and is unreported.

The opinion of the United States Court of Appeals, Ninth Circuit denying Mr. Soriano's Petition for Review from the denial of Mr. Soriano's Motion to Vacate his *in absentia* order of removal on April 23, 2007 appears at Appendix C and is unreported.

The opinion of the Board of Immigration Appeals affirming the Immigration Court's final order of removal on June 8, 2005 appears as Appendix D and is unreported.

The opinion of the Immigration Judge explaining and re-affirming his previous denial of Petitioner's Motion to Vacate his *in absentia* order of removal on September 20, 2004 appears at Appendix E and is unreported.

The opinion of the Board of Immigration Appeals remanding Mr. Soriano's appeal of the denial of his Motion to Vacate *in absentia* removal

order on August 17, 2004 appears at Appendix F and is unreported.

The opinion of the Immigration Judge denying petitioner's Motion to Vacate his *in absentia* order of removal on December 15, 2003 appears at Appendix G and is unreported.

JURISDICTION

The Judgment of the Court of Appeals was entered on November 19, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1) The Fifth Amendment of the United States Constitution provides in relevant part that "No person shall be...deprived of life, liberty, or property without due process of law."

2) Section 240(b) of the Immigration and Nationality Act, codified at 1229a of Title 8 of the United States Code provides:

> (b) Conduct of proceeding
>
> (5) Consequences of failure to appear
>
> (A) In general
>
> Any alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided that the alien is removable (as defined in subsection (e)(2) of this section). The written notice by the attorney general shall be considered sufficient for purposes of this subparagraph if provided at the most recent address provided under section 1229(a)(1)(F) of this title.
>
> (c) Rescission of order
>
> Such an order may be rescinded only-
>
> (1) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional

> circumstances (as defined in subsection (e)(1) of this section.
>
> (e) Definitions
>
> In this section and section 1229b of this title:
>
> (1) Exceptional circumstances
>
> The term "exceptional circumstances" refers to exceptional circumstances (such as serious illness of the alien, serious illness or death of a spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.
>
> (2) Removable
>
> The term removable means-
>
> (A) in the case of an alien not admitted to the United States, that the alien is inadmissible under section 1182 of this title, or
>
> (B) in the case of an alien admitted to the United States, that the alien is deportable under section 1227 of this title.

3) Section 1003.23(b)(4)(ii) of Title 8 of the Code of Federal Regulations provides:

> (ii) Order entered in absentia or removal proceedings. An order of removal entered in absentia or in removal proceedings pursuant to section 240(b)(5) of the Act may be rescinded only upon a motion to reopen filed within 180 days after the date of the order of removal, if the alien demonstrates that the failure to appear was because of exceptional circumstances as defined in section 240(e)(1) of the Act. An order entered in absentia pursuant to section 240(b)(5) may be rescinded

upon a motion to reopen filed at any time if the alien demonstrates that he or she did not receive notice in accordance with sections 239(a)(1) or (2) of the Act, or the alien demonstrates that he or she was in Federal or state custody and the failure to appear was through no fault of the alien. However, in accordance with section 240(b)(5)(B) of the Act, no written notice of a change in time or place of proceeding shall be required if the alien has failed to provide the address required under section 239(a)(1)(F) of the Act. The filing of a motion under this paragraph shall stay the removal of the alien pending disposition of the motion by the Immigration Judge. An alien may file only one motion pursuant to this paragraph.

4) Section 1003.2 of Title 8 of the Code of Federal Regulations provides:

(c) Motion to reopen.

(1) A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available

and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in § 1001.1(p) of this chapter, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act (8 U.S.C. 1182(c)) may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation.

STATEMENT OF THE CASE

This case involves the failure of the Board of Immigration Appeals ("BIA" or "Board") and the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") to equitably toll the 90-day time limit for filing a motion to reopen where the alien demonstrates both that he has been pursuing his rights diligently and that extraordinary circumstances stood in his way.

The Ninth Circuit refused to adopt such a rule in this case and despite multiple briefings on the issue, summarily dismissed Mr. Soriano's petition, holding that he did not establish that equitable tolling applies to his motion to reopen without any explanation. As an alien in a removal proceeding is subject to strict statutory constraints including numerical bars and time limit periods, a motion to reopen should not be denied based on technicalities or applying incorrect evidentiary standards. Instead, to afford aliens their right to due process, motions to reopen should grant an alien every opportunity to have his or her case heard based on its merits. Hence, to prevent a grave miscarriage of justice, this Honorable Court should grant a writ of certiorari in this case.

Petitioner Felipe Soriano-Arellano ("Mr. Soriano" or "Petitioner") is a native and citizen of Mexico. Mr. Soriano has lived continuously in the United States since 1985. On April 19, 1993, Mr. Soriano married Judith Lara ("Mrs. Soriano"). The couple has three United States citizen children together. Belen Deyanira Soriano is sixteen-years old. The couple's second child, Sinai Soriano, is ten-years old. Israel Soriano-Lara is the couple's youngest child. Israel will be turning two-years old

as of May of this year. Since 1993, Mr. Soriano owns and operates a small gardening company, which he uses to provide financial support to his family. Mr. Soriano is a person a good moral character, law abiding and has never violated any law in the United States or any where in the world.

Prior to his merits hearing on September 12, 2003, Mr. Soriano had attended nine hearings relating to his immigration proceeding from 1998 to 2003. On September 11, 2003, however, the day before Mr. Soriano's merit hearing, Mr. Soriano contracted a serious and debilitating stomach virus. The morning of the merits hearing, Mr. Soriano symptoms were worsening, he was vomiting repeatedly to the point where he was forced to see his family physician, Dr. Richard E. Hiltner, M.D. Dr. Hiltner diagnosed Mr. Soriano with acute gastroenteritis, which caused him sudden and violent convulsions, vomiting and diarrhea. Dr. Hiltner prescribed medication and instructed Mr. Soriano to stay home and rest for at least the next two days. Due to his illness, Mr. Soriano was bedridden and unable to attend the merits hearing that was scheduled that day. Knowing that attendance at his merits hearing had been imperative, Mrs. Soriano called the court to notify them of her husband's condition. When the court's clerk asked her for her husband's "alien number," she responded that she did not know the number. The clerk then suggested that she contact Petitioner's attorney to help deal with the situation. Mrs. Soriano immediately did just that and related her husband's condition to a legal assistant at her attorney's office. The legal assistant contacted Mr. Soriano's counsel, who informed the court of the

emergency that prevented Mr. Soriano's ability to attend the hearing.

The Immigration Judge, however, declined to continue the hearing and issued an *in abstentia* order of removal. On November 18, 2003, Petitioner filed a motion to vacate an *in absentia* removal order and reopen proceedings ("Motion to Vacate") with the Immigration Court. His Motion to Vacate was filed with a personal declaration stating the relevant events of September 12, 2003, and a doctor's prescription in support of the exceptional circumstances for not appearing at his removal hearing. Without opinion, the Immigration Court denied the Motion to Vacate on December 15, 2003.

A Notice of Appeal to the Board was filed on January 20, 2004. In its decision dated August 17, 2004, the Board stated that when a motion to reopen is denied, the Immigration Judge must fully explain its reasons for the denial. On this basis, the Board remanded the case back to the Immigration Court.

On September 20, 2004, the Immigration Judge again denied the Motion to Vacate, stating that the *only* document to corroborate Petitioner's illness was a doctor's prescription and the Judge did not consider this to be sufficient medical documentation to grant the motion to reopen. The Immigration Judge completely ignored the fact that Mr. Soriano filed with his Motion to Vacate a personal declaration stating the relevant events of September 12, 2003, and his doctor's prescription corroboration the exceptional circumstances for not appearing at his removal hearing. Pursuant to Title 8 C.F.R. § 1003.23(b)(4)(ii), the Immigration Judge's denial of Mr. Soriano's Motion to Vacate barred him from filing any other motions to reopen. Mr. Soriano

again appealed to the BIA. The Immigration Judge further stated in his decision, "I do not believe that his *subsequent* submission of medical documentation is sufficient. So my decision remained the same." (Emphasis added). The Immigration Judge, however, was mistaken in this statement as Mr. Soriano had filed only one motion to vacate his *in absentia* removal and reopen proceedings and there was never any subsequent submission of any kind to the Immigration Court.

Mr. Soriano again appealed to the BIA. On June 8, 2005, the BIA dismissed the appeal and affirmed the decision of the Immigration Judge. On July 8, 2005, Mr. Soriano filed a petition for review of the Board's June 8, 2005 decision before the Ninth Circuit. On April 23, 2007, the Ninth Circuit denied Mr. Soriano's petition for review of the decision of the BIA.

On November 8, 2007, a Motion to Reopen was filed with the Board, citing the existence of new, previously unavailable evidence. On March 4, 2008, the Board dismissed Mr. Soriano's Motion to Reopen. On April 3, 2008, Mr. Soriano petitioned the Ninth Circuit for review of the Board's decision. On November 19, 2009, the Ninth Circuit granted the Office of Immigration Litigation's Motion to Dismiss for Lack of Jurisdiction and dismissed Mr. Soriano's petition for review, holding that Petitioner's Motion to Reopen was untimely and that equitable tolling did not apply in Petitioner's case.

REASONS FOR GRANTING THE PETITION

I.
INTRODUCTION

Since 2003, Mr. Soriano has simply been asking for his day in court. Initially, his Motion to Vacate was summarily denied by the Immigration Judge without any explanation. Mr. Soriano had to appeal to the Board of Immigration Appeals to receive any explanation for this denial. To Mr. Soriano's surprise, the reasoning for the Immigration Judge's decision was because of his enforcement of an arbitrary "sufficiency of the evidence" standard that is not even the standard set forth by statute or case law. When the Board of Immigration Appeals and then the United States Court of Appeals for the Ninth Circuit upheld this "sufficiency of the evidence standard," which was arbitrary and contrary to their own evidentiary standards, Mr. Soriano brought the instant Motion to Reopen. The legislative intent of the statute and case law has firmly established that the BIA must look at the "totality of the circumstances" in order to determine it were reasonable that the petitioner could not have been expected to attend the scheduled hearing. Here, Mr. Soriano submitted a personal declaration and a doctor's prescription as evidence that he contracted a serious stomach virus that required medical attention and left him bedridden for two days. Further, the day of his hearing, he had his wife make repeated efforts to contact the court to let them know immediately about his emergency and inability to attend the hearing.

Mr. Soriano's Motion to Reopen should be deemed timely as equitable tolling applies to his

Motion and his case should be remanded to the Ninth Circuit for further consideration on the merits of his Petition for Review. Mr. Soriano has not sat on his rights for a day and has been diligently pursuing his claim since the Immigration Judge ordered his removal *in absentia*. Further, prior to the Immigration Judge entering the *in absentia* removal order, Mr. Soriano had timely appeared to every single one of his court hearings as ordered by the Immigration Court and had complied with all the filing deadlines set forth by the Immigration Judge when filing his cancellation of removal application such as his supporting documents and proof of his biometrics. More importantly, Mr. Soriano was completely prepared to present the merits of his application for cancellation of removal as he met the statutory requirements for cancellation for removal, namely ten years of continuous physical presence, good moral character and exceptional and extremely unusual hardship on his U.S. citizen children.

Mr. Soriano relied on good faith that his claim would be ruled based on the evidentiary standards set forth by prevailing case law and was unable to file another motion to reopen after his Motion to Vacate was denied by the Immigration Judge due to the numerical bar on filing more than one motion to reopen. The existence of these extraordinary circumstances and Mr. Soriano's diligence in pursuing his rights merit the equitable tolling of Mr. Soriano's Motion to Reopen.

The persistent efforts of the Immigration Judge and the Board of Immigration Appeals to enforce new evidentiary standards and refuse to hear Mr. Soriano's claims based on its merits is a clear deprivation of his liberty so fundamentally unfair as

to deprive Mr. Soriano of his Fifth Amendment right to due process. Moreover, the decision of the Ninth Circuit to dismiss Mr. Soriano's Petition for Review, not on the merits, but based upon a technicality further violates Mr. Sorianos' right to due process.

Moreover, Mr. Soriano was denied procedural due process when the Immigration Judge denied Mr. Soriano's Motion to Vacate without either inviting him to remedy its alleged "deficiencies" or noting his entitlement to file a second, "properly supported" motion. Instead, the Immigration Judge denied Mr. Soriano's Motion to Vacate without an opinion, triggering Mr. Soriano to file a series of appeals which have, to this day, not vindicated Mr. Soriano's right to a trial based on the merits of his claims. Mr. Soriano was then precluded from filing any other motion and was therefore, subject to removal from the United States. This denial of Mr. Soriano's due process, if not overturned by this Court, would completely destroy Mr. Soriano's family emotionally and economically. As his family will not follow him to Mexico. Mr. Soriano's three children will be separated from their father, and their mother will be forced to request financial assistance from the U.S. government to support his three U.S. citizen children. Mr. Soriano's deprivation of due process further prejudiced his application for cancellation of removal as his removal proceedings were terminated without clear, unequivocal and convincing evidence.

II.

MR. SORIANO'S MOTION TO REOPEN IS TIMELY

Mr. Soriano's Motion to Reopen is timely. The period between the BIA's order affirming the

Immigration Judge's in absentia removal order and the date of Mr. Soriano's discovery of new, previously unavailable evidence should be equitably tolled as Mr. Soriano was exercising due diligence throughout this period and extraordinary circumstances prevented Mr. Soriano from filing his Motion to Reopen at an earlier time. Moreover, this period should be equitably tolled in order to prevent the unconscionable result of depriving Mr. Soriano of the right to ever have his claims heard based on their merits.

Further, equity demands that the numerical bar on motions to reopen be equitably tolled. Courts have recognized in situations, such as in Mr. Soriano's, in which a grave miscarriage of justice would otherwise be committed upon the petitioner, that the numerical bar on motions should be equitably tolled.

A. MR. SORIANO'S MOTION TO REOPEN SHOULD BE EQUITABLE TOLLED

The relevant statute of limitation here is set forth in Title 8 C.F.R. § 1003.2(c)(2), which provides a 90-day filing deadline for motions to reopen. This Court held in *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) that the "equitable [tolling] doctrine is read into every federal statute of limitation." *Id.* The Ninth Circuit holds that "[i]n tolling statutes of limitations, courts have typically assumed that the event that 'tolls' the statute simply stops the clock until the occurrence of a later event that permits the statute to resume running." *Socop-Gonzales v. INS*, 272 F.3d 1176, 1195 (9th Cir. 2001) (Citations omitted).

This Court set forth the standard for analyzing whether to equitably toll a petitioner's claim in *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Here this Court held that "a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Id.*

Mr. Soriano's Motion to Reopen is timely as the period between June 8, 2005 and August 15, 2007 should be equitably tolled. On June 8, 2005, the BIA issued its order dismissing Mr. Soriano's appeal. Mr. Soriano, in good faith reliance on statutory authority, believed that he was numerically barred from filing another motion to reopen and instead pursued the appeal of the decision on his Motion to Vacate to the Ninth Circuit. However, on August 15, 2007, Mr. Soriano's counsel discovered a recent decision in which the BIA once again affirmed and applied the correct evidentiary standard for a showing of "exceptional circumstances," the standard they did not apply for Mr. Soriano's Motion to Vacate. Within ninety (90) days thereafter, Mr. Soriano filed the present Motion to Reopen.

On August 6, 2007, the BIA entered its ruling in *In re Kun Ru Wang*, 2007 WL 2463932 (BIA, August 2007). The BIA's ruling in *In re Kun Ru Wang* reaffirmed the standard for reviewing a petitioner's claim for "exceptional circumstances" under section 240(e)(1) of the Immigration and Nationality Act as requiring review of the "totality of the circumstances." *Id.* Such a standard is consistent with the intent of the legislatures in drafting the pertinent statute and prevailing case law.

In *Matter of W-F-*, 21 I&N Dec. 503, 509 (BIA 1996), the Board held that,

> "One *must* look to that 'totality of the circumstances' to resolve this issue of exceptional circumstances. See H.R. Conf. Red. No. 955, 101st Cong., 2d Sess. 132 (1990), reprinted in 1990 U.S.C.CC.A.N. 6784, 6797 ("[T]he conferees expect that in determining whether an alien's failure to appear was justifiable the Attorney General will look at the totality of the circumstances to determine whether the alien could not reasonably have been expected to appear.") (Emphasis added).

Id.

Although an unpublished opinion, the ruling in *In re Kun Ru Wang* affirmed Mr. Soriano's belief that the Immigration Judge and the BIA had erred in applying the arbitrary "insufficient evidence" standard to Mr. Soriano's Motion to Vacate. The holding and standard set forth in *In re Kun Ru Wang*, along with the additional medical documentation obtained by Mr. Soriano's physician, posed new evidence which merited the reopening of Mr. Soriano's removal proceedings.

Moreover, Mr. Soriano's Motion to Reopen should be deemed timely as the alternative would produce an unconscionable result. Equity calls for the tolling of the numerical and time limitations for motions to reopen where, due to circumstances external to petitioner's own conduct, it would be unconscionable to enforce the limitation period

against the petitioner and gross injustice would result. *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000). In the present instance, it would be a gross miscarriage of justice to enforce the 90-day limit period on Mr. Soriano's Motion to Reopen. Since 2003, Mr. Soriano has been diligently pursuing his claim, refusing to be deprived of his right to present the merits of his application for cancellation of removal. Due to circumstances external to Mr. Soriano's own conduct, however, the Immigration Judge, the BIA and the Ninth Circuit have failed to follow legislative intent for the evidentiary standard for the analysis of "exceptional circumstances" pursuant to Section 1229a of Title 8 of the United States Code and prevailing case law. Therefore, this Court should equitably toll Mr. Soriano's numerical and time limitations on his Motion to Reopen to prevent what would otherwise be an unconscionable result.

Further, Mr. Soriano clearly meets both of the elements set forth by this Court in *Pace*. Mr. Soriano diligent pursued his rights since his inability to attend his September 12, 2003 merits hearing resulted in his *in absentia* removal. Furthermore, extraordinary circumstances persistently stood in Mr. Soriano's way of having his claim heard on its merits.

i. Mr. Soriano Persistently Exercised Due Diligence in Pursuing his Motion to Reopen

After the Immigration Judge denied Petitioner's Motion to Vacate based upon arbitrary evidentiary standards in contravention of the law, Mr. Soriano acted diligently and persistently in

seeking review of the Immigration Judge's decision in accordance with the time and numerical limitations for rescinding an order of removal entered in absentia in removal proceedings pursuant to section 240(b)(5) of the Immigration and Nationality Act. At no point from September 12, 2003 going forward did Mr. Soriano sleep on his rights. On the contrary, Mr. Soriano consistently pursued every avenue possible in order to ensure that he would be given his right to his day in court.

The period in which Mr. Soriano's appeal was pending with the Ninth Circuit should be equitably tolled as throughout this period, Mr. Soriano acted with due diligence in pursuing the reopening of his case. Mr. Soriano timely filed a petition for review with the Ninth Circuit on July 8, 2005 after the Board dismissed his appeal. Further, Mr. Soriano requested a panel rehearing and a rehearing en banc on June 6, 2007 after the Ninth Circuit denied his petition for review.

Finally, Mr. Soriano acted diligently when he continued to pursue his case and ultimately discovered new evidence and law in which to bring a motion to reopen. In doing so, Mr. Soriano utilized the only avenue left for him by discovering and submitting new evidence and filing his motion to reopen before the Board on November 8, 2007.

Mr. Soriano's diligent pursuit of his rights is evidenced by in his unbroken efforts to pursue his case before the Immigration Court, the Board, the Ninth Circuit and finally, in this Court.

ii. **The Facts Surrounding Mr. Soriano's Case Rise to the Level of Extraordinary Circumstances and Merit the Application of the Doctrine of Equitable Tolling**

The facts surrounding Mr. Soriano's case rise the level of extraordinary circumstances as at every turn, Mr. Soriano followed the mandates and standards proscribed by statutory and case law and at every turn, Mr. Soriano was denied the right to have his case heard on its merits using the correct standard afforded by the law. Mr. Soriano relied on both statutory law and the prevailing case law, which provided that the facts of his case would be analyzed under the "totality of the circumstances" standard in order to show a finding of "exceptional circumstances." See *Matter of W-F-*, 21 I&N Dec. 503, 509 (BIA 1996).

The United States Court of Appeals for the First Circuit holds, "In our view, one reason the Immigration Judge *must* consider the totality of the circumstances in deciding the validity of a claim of exceptional circumstances is to ensure that an alien is not deprived of a meaningful opportunity to be heard." *Kaweesa v. Gonzales*, 450 F.3d 62, 69-70 (1st Cir. 2006) (Emphasis added). In holding as such, the First Circuit joins practically every circuit court including the Second, Third, Fifth, Sixth, Seventh, Eighth and Tenth Circuit in holding that a finding of "exceptional circumstances" is reviewed by an Immigration Judge under the "totality of the circumstances" standard. See *Alrefae v. Chertoff*, 471 F.3d 353 (2d Cir. 2006); *Zheng v. Atty Gen.*, 549 F.3d 260 (3d Cir. 2008); *U.S. v. Moreno*, 420 F.3d 420 (5th Cir. 2005); *Denko v. INS*, 351 F.3d 717 (6th Cir.

2003); *Uriostegui v. Gonzales*, 415 F.3d 660 (7th Cir. 2005); *Bejet-Viali Al Jo-Jo v. Gonzales*, 424 F.3d 823 (8th Cir. 2005); and *Tang v. Ashcroft*, 354 F.3d 1192 (10th Cir. 2003).

Moreover, in *Singh v. INS*, 213 F.3d 1050, 1053 (9th Cir. 2000), the Ninth Circuit found that contrary to the Immigration Court and the BIA's decisions, Singh complied with [8 C.F.R. § 1003.2(c)(1)] when he presented his affidavit, and that of a witness, to support his claim that his injury rose to the level of exceptional circumstances. At the time when Singh submitted his evidence, neither the statute, the regulations, nor the applicable case law required a petitioner to produce an affidavit from a doctor or his employer, or to contact the court immediately. The weight that must be placed on an affidavit is also evidenced by the Ninth Circuit's decision in *Maroufi v. INS*, 772 F.2d 597, 600 (9th Cir. 1985). As per *Maroufi*, the Board is under an affirmative obligation to "accept as true the facts stated in an alien's affidavit in ruling upon his motion to reopen unless it finds those facts to be inherently unbelievable." *Id* at 600 (internal quotation marks omitted) (citing *Hamid v. INS*, 648 F.2d 635, 637 (9th Cir. 1981)). Corroboration of a credible declaration by an alien moving to reopen is not required. *Id.* Further, Title 8 C.F.R. § 1003.2(c)(1) provides that a motion to reopen "shall be supported by affidavits or other evidentiary material."

Further, as the phrase "serious illness" is not defined in the statute, the BIA has set forth several ways in which such an illness may be established such as "[a] medical professional...comment[], in detail, on the severity of the illness of the alleged..."

or "*in the alternative*, [such a] claim may [be] substantiated through detailed affidavits from the respondent, roommates, friends, and co-workers attested to the extent of his disabilities and the remedies used." *Lonyem v. U.S. Atty. Gen.*, 352 F.3d 1338 (11th Cir. 2003) (citing *In re J-P-*, 22 I&N Dec. 33 (BIA 1998)) (Emphasis added).

In the present instance, Mr. Soriano submitted both an affidavit and a prescription dated the date of his merits hearing. The prescription was medication which Mr. Soriano used to combat the severe stomach virus that left him bedridden the day of the merits hearing. In Mr. Soriano's affidavit, he affirmed that he had been suffering from a severe stomach virus and that his wife had contacted the judge directly the day of the hearing to relate the emergency he was undergoing. When his wife was unable to reach the judge, his wife immediately contacted Mr. Soriano's counsel so that court could be notified immediately of Mr. Soriano's reason for being unable to attend the hearing. Relying on the case law and statutory requirements, Mr. Soriano submitted the information he gathered in support of his Motion to Vacate believing in good faith that he met the evidentiary standards proscribed by law to demonstrate that there had been "exceptional circumstances" that prevented his appearance at the merits hearing. The Immigration Judge, however, arbitrarily focused only on the doctor's prescription and deemed this "insufficient evidence." This is despite case law which firmly establishes that he must consider "in the alternative" evidence such as Mr. Soriano's detailed affidavit. In focusing solely on the doctor's prescription, the Immigration Judge made a decision that was contrary to statutory and all prevailing case law on the issue.

Due to this gross miscarriage of justice, Mr. Soriano was forced to file appeals first with the BIA and then with the Ninth Circuit. As prevailing case and statutory law supported Mr. Soriano's assertion that the Immigration Judge applied the wrong evidentiary standard and abused his discretion in denying Mr. Soriano's Motion to Vacate, Mr. Soriano decided to continue appealing his case. It is not until the Board had affirmed the decision of the Immigration Judge and Mr. Soriano was preparing to take his case to the Ninth Circuit did Mr. Soriano receive additional evidence that supported his claim. On August 13, 2007, Mr. Soriano was informed of a recent BIA decision *In Re Kun Ru Wang, supra,* which affirmed that the evidentiary standard to demonstrate "exceptional circumstances" was the "totality of the circumstances" and that an affidavit from the petitioner was sufficient to prove that relief should be granted.

Therefore, Mr. Soriano requests that the time while his appeal was pending with the Ninth Circuit and up until the date he obtained the additional evidence supporting his case in the form of the holding in the *Wang* case be tolled. As stated in *Socop-Gonzalez*, "the days during a tolled period simply are not counted against the limitations period." *Socop-Gonzalez, supra*, 272 F.3d at 1195. This gives Mr. Soriano ninety days after August 13, 2007, the date in which Mr. Soriano's counsel discovered the ruling in the *Wang* case, to file a motion to reopen, or until November 11, 2007. As Mr. Soriano filed his motion to reopen on November 8, 2007 he clearly met the 90-day time limitation had his claim been equitably tolled.

In *Socop-Gonzalez*, the petitioner "based his motion to reopen on the ground that he relied to his detriment on the incorrect advice of the INS officer." *Socop-Gonzalez, supra*, 272 F.3d 1176, 1182. Based on this reliance, the Ninth Circuit held that the incorrect advice received by petitioner from the INS officer would equitably toll petitioner's 90-day time limit period. *Id.*

In the present instance, Mr. Soriano should similarly not be penalized for reasonably relying on statutory authority and prevailing case law and unfortunately being before an Immigration Judge who ruled on Petitioner's case contrary to law. Through no fault of his own and despite due diligence, all of the afore stated facts – Mr. Soriano's reliance on the statutes, regulations, BIA and Ninth Circuit precedent and congressional requirements and Mr. Soriano's inability to predict that the Immigration Judge would rule on his motion contrary to the aforesaid authorities –support the equitable necessity that Mr. Soriano's claims be considered equitably tolled and timely. For the foregoing reasons, Mr. Soriano respectfully requests that the period from June 8, 2005 until August 13, 2007 be equitably tolled and as such, his Motion to Reopen be considered timely.

B. MR. SORIANO'S MOTION TO REOPEN IS NOT NUMERICALLY BARRED

Title 8 C.F.R. § 1003.23(b)(4)(ii) proscribes the procedure for rescinding an order of removal entered in absentia as filing a motion to reopen. Pursuant to the Code of Federal Regulation, an alien may only file one such motion. Mr. Soriano's Motion to

Reopen, however, should not be numerical barred. Instead, the doctrine of equitable tolling should be applied to prevent a grave miscarriage of justice. In *Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003), the Ninth Circuit held that it "recognizes equitable tolling of deadlines and numerical limits on motions to reopen or reconsider . . ."

The circuit court in this jurisdiction further held in *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1227 (9th Cir. 2002), that "[t]he defective representation petitioners received equitably tolled the numerical limit on motions to reopen and constituted ineffective assistance of counsel, requiring a new hearing on the issue of suspension of deportation." Therefore, "[t]he numerical limit on motions to reopen, however, may be waived (or tolled) in cases where a petitioner has been defrauded..." *Id.* at 1224. (Internal citations omitted).

Although the facts of the present case are distinctive from the facts in the *Rodriguez-Lariz* case, the Ninth Circuit specifically reserved this doctrine for other instances in which it would be similarly equitable to apply it stating that "the doctrine is by no means limited to these situations." *Socop-Gonzalez, supra*, 272 F.3d 1193. In the present instance, Mr. Soriano was deprived of the opportunity in his Motion to Vacate to have present additional evidence to the Immigration Judge so that his claim of exceptional circumstances could be heard on its merits. Instead, the Immigration Judge first denied his motion to reopen without any explanation and then when the Board remanded the case so that the judge had to provide an explanation. When the Immigration Judge finally explained its decision, the decision consists of a reference to an arbitrary

evidentiary standard unsupported by statute or case law and contained no analysis as to the merits of Mr. Soriano's claims. Such a decision, which was upheld by both the Board and the Ninth Circuit, is a grave miscarriage of justice of the same level as being defrauded or receiving ineffective assistance of counsel.

Furthermore, the Seventh Circuit in *Joshi v. Ashcroft*, 389 F.3d 732, 734 (7th Cir. 2004), held that "an alien having failed to appear at his removal hearing is ordered ('in absentia') removed may file only one motion to reopen [citation], unless the previous motion was denied for purely technical deficiencies." Here, Mr. Soriano's Motion to Vacate was denied for purely technical deficiencies as the Immigration Judge simply ruled that Mr. Soriano submitted "insufficient medical documentation to warrant the granting of his motion to reopen." Even the present Motion to Reopen at issue was also denied for purely technical deficiencies as the Board denied the motion as untimely.

For the foregoing reasons, Mr. Soriano's claim merits the application of the doctrine of equitable tolling so that Mr. Soriano will not be numerically barred from filing the instant Motion to Reopen.

III.

THE REFUSAL OF THE IMMIGRATION JUDGE AND THE BOARD OF IMMIGRATION APPEALS TO HEAR MR. SORIANO'S CLAIMS BASED ON THEIR MERITS IS A CLEAR VIOLATION OF HIS RIGHT TO DUE PROCESS

A. MR. SORIANO'S DUE PROCESS RIGHTS WERE VIOLATED

The statutory concern with notice and exceptional circumstances is grounded in due process considerations. See e.g., *Nazarova v. INS*, 171 F.3d 478, 482 (7th Cir. 1999). Circuit Courts have stated repeatedly that "the Fifth Amendment entitles aliens to due process of law in deportation proceedings." *Choeum v. INS*, 129 F.3d 29, 38 (1st Cir. 1997) (quoting *Reno v. Flores*, 507 U.S. 292, 306 (1993)). As the Ninth Circuit has stated, "[t]he liberty interests involved in removal proceedings are of the highest order. Removal visits a great hardship on the individual and deprives him [or her] of the right to stay and live and work in this land of freedom." *Lanza v. Ashcroft*, 389 F.3d 917, 927 (9th Cir. 2004) (Citation and internal quotation marks omitted).

Moreover, this Court recently reaffirmed the importance of a motion to reopen, recognizing that such a motion serves as an "important safeguard" intended to "ensure a proper and lawful disposition" of immigration proceeding. *Kucana v. Holder*, 2010 WL 173368 at 6 (U.S. 2010).

In the present instance, Mr. Soriano was denied his right to due process. The Immigration Judge re-affirmed his issuance of a removal order *in absentia* initially with no explanation whatsoever and then after remand by the BIA, with a decision that lacked any analysis at all on the merits of Mr. Soriano's claim. Such a decision was made despite strong evidence for Mr. Soriano's claim in the form of detailed affidavit by Mr. Soriano and other and evidence supporting the fact that Mr. Soriano sought medical treatment the day of his missed hearing. All

of this evidence supported the fact that Mr. Soriano was gravely ill and unable to appear in court due to exceptional circumstances. The Immigration Judge, however, did not reach a decision based on the facts of Mr. Soriano's claim or the credibility of the statements in his affidavit. Instead, he circumvented the issue entirely by creating an arbitrary evidentiary standard that was contrary to prevailing case law and legislative intent that he then proclaimed Mr. Soriano failed to meet. In failing to apply the "totality of the circumstances" evidentiary standard in analyzing Mr. Soriano's claim of "exceptional circumstances," the Immigration Judge was essentially depriving Mr. Soriano of his due process right to a fair hearing. As the eloquently put, "...the Immigration Judge *must* consider the totality of the circumstances in deciding the validity of a claim of exceptional circumstances is to ensure that an alien is not deprived of a meaningful opportunity to be heard." *Kaweesa v. Gonzales*, 450 F.3d 62, 69-70 (1st Cir. 2006) (Emphasis added).

Even more egregious, the Immigration Judge did not even state that this was his reasoning in his initial decision to deny Mr. Soriano's Motion to Vacate. In doing so, the Immigration Judge eradicated Mr. Soriano's right to gather additional evidence regarding his emergency from his doctor and then file a Motion to Reconsider. Instead, the Immigration Judge denied the Motion to Vacate without any explanation and triggered the series of appeals that followed. The consequences of denying Mr. Soriano's Motion to Vacate on a technicality are far reaching. This denial summarily deports Mr. Soriano and further prevents him from being

afforded the ability to argue for his cancellation of removal proceedings on its merits.

An *in absentia* deportation is a drastic consequence. As such Courts have afforded aliens the right to remedy any technical deficiencies or otherwise advise them of their entitlement to file a second, fully supported motion. Further, Courts and the BIA itself have held that such actions rise to the level of depriving the alien of their procedural due process rights. In *Saakian v. INS*, 252 F.3d 21 (1st Cir. 2001), the First Circuit Court held as follows:

> "Alien was denied procedural due process when his appeal from denial of motion to reopen in absentia deportation order based on ineffective assistance of counsel was not heard on the merits; the Immigration Judge's (IJ) denied the motion without either inviting alien to remedy its deficiencies or noting alien's entitlement to file a second, properly supported motion, and Board of Immigration Appeals (BIA) did not analyze the merits of alien's claim based on the Lozada materials he had submitted, even though he was entitled, as an in absentia deportee, to more than one bite at the apple." *Id.* (Citing U.S.C.A. Const.Amend. 5; 8 C.F.R. § 3.23(b)(3), (b)(4)(iii)(D)).

The *Saakian* Court further noted that,

> "[I]n ruling as he did, the [Immigration Judge] actually used language seeming to suggest that, by filing a deficient motion, Saakian had lost his one and

> only opportunity to allege ineffective assistance of counsel. Elevating form over substance, the BIA then upheld this course of conduct without analysis. As a result, Saakian's ineffective assistance of counsel claim has not been examined, despite Saakian's persistent efforts to have it heard. This violates due process."

Id. at 26 (Emphasis added) (citing *Ontiveros-Lopez v. INS*, 213 F.3d 1121, 1124-25 (9th Cir. 2000).

Further, the BIA itself has held in *In re Rivera-Claros*, 21 I&N Dec. 599, 607, fn. 5 (BIA 1996) that a respondent's deficient Lozada submission "does not foreclose the respondent's filing of a supplemental motion that satisfies all the requirements."

Similarly, in the present case, Mr. Soriano was denied procedural due process because his claim of exceptional circumstances was not heard on its merits. Instead the Immigration Judge only denied Petitioner's case because of "insufficient evidence" to warrant granting Petitioner's motion to vacate. The Immigration Judge did not allow Mr. Soriano to remedy the deficiencies of his motion by continuing Petitioner's proceedings or by extending his decision to allow Petitioner time to acquire additional medical documentation. As Mr. Soriano was well within the 180-day filing period, the Immigration Judge could easily have done so. The Immigration Judge also failed to advise Mr. Soriano of his entitlement to file a second motion fulfilling the evidentiary standards set forth by the Immigration Judge. Instead he

denied the motion without any explanation, necessitating the beginning of a chain of appeals in which Mr. Soriano diligent pursued his due process rights and foreclosing all rights and entitlements that Mr. Soriano had to file a supplemental motion to reopen or a motion to reconsider.

Ironically, Mr. Soriano's desire to have "another bite of the apple" before his motion to vacate was summarily denied is just what the Immigration Judge appears to believe he afforded Mr. Soriano the opportunity to do. In his decision, the Immigration Judge states,

> "I am once again denying the motion to reopen because I do not believe the Respondent submitted sufficient medical documentation for me to grant the motion to reopen...I do not believe that his subsequent submission of medical documentation is sufficient. So my decision remained the same."

It is not clear whether the Immigration Judge simply did not look at the medical documentation initially or that he believed he afforded Mr. Soriano the opportunity to submit additional medical documents in support of his claim. Nevertheless, Mr. Soriano was never afforded the opportunity to supplement his motion to reopen with additional evidence to meet the arbitrary standard set forth by the Immigration Judge.

At every step of the way since the Immigration Judge ordered Mr. Soriano removal *in absentia*, Mr. Soriano has been denied his due process rights. He was prevented from having his motion to reopen heard on the merits first with no explanation at all

and then after appealing, with an explanation that did not even take into account the merits of his claim. As a consequence, Mr. Soriano is further being deprived of his due process rights as he is being ordered to leave the country without ever having had his day in court. The violation of Mr. Soriano's constitutional right to due process needs to stop and this Court should remand and have Mr. Soriano's claims heard based on its merits.

B. THE DENIAL OF MR. SORIANO'S DUE PROCESS PREJUDICED THE OUTCOME OF HIS REMOVAL PROCEEDINGS

The blatant deprivation of Mr. Soriano's due process rights clearly prejudiced Mr. Soriano's case. Mr. Soriano's family will be prejudiced emotionally as well as economically if this Court fails to remedy the clear violation of Mr. Soriano's due process rights. Mr. Soriano's three children, two of which are only of elementary school age, will be separated from their father. In addition to the emotional trauma this will cause for Mr. Soriano's two younger children, as Mr. Soriano provides the support for his family, Mrs. Soriano will be forced to seek financial assistance from the U.S. government in order to be able to provide for and support their three children.

Mr. Soriano has been prejudiced throughout these proceedings. Mr. Soriano was prejudiced by the Immigration Judge, who capriciously created a new evidentiary standard and then eliminated any chance Mr. Soriano had to follow these "new standards" by foreclosing Mr. Soriano's chances of filing a motion to reconsider or a motion to reopen. Mr. Soriano was prejudiced by the Immigration

Judge, who failed to follow the "totality of the circumstances" standards set forth by the legislative intent and case law for analyzing whether "exceptional circumstances" exist. In an even more egregious display of prejudice, the Board of Immigration appeals affirmed the "new standard" set forth by the Immigration Judge, failing to follow both the legislative intent of the statutory law and their own precedent.

The Ninth Circuit further prejudiced Mr. Soriano by abusing its discretion and failing to admit into evidence the letter from Mr. Soriano's family physician, Dr. Hilter. Dr. Hiltner's letter was submitted in Mr. Soriano's Reply to Respondent's Brief filed on April 3, 2006. Dr. Hilter's letter corroborated Mr. Soriano's statements in his affidavit, stating that Mr. Soriano was suffering from a stomach virus known as gastroenteritis and recommended him to stay in bed for two days. Pursuant to the Federal Rule of Evidence 201, the Ninth Circuit is permitted to take notice of any "adjudicative" fact "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Case law has interpreted this to mean that courts are given a wide range of discretion in taking judicial notice of facts such as Japan having a constitution, a legislature that creates statutes, and a court system that gives judicial decisions and operates by means of lawyers. *Dulles v. Katamoto*, 256 F.2d 545, 547 (9th Cir. 1958). This statutory authorization of a broad application of the powers of the court to take judicial notice of certain facts has been interpreted even more extensively in the

context of appellate review of an agency. Jack B. Weinstein and Margaret A. Berger, *Weinstein's Federal Evidence* § 201.02[4] (2d ed. 2004).

In the present instance, the Ninth Circuit, in an abuse of discretion, failed to take judicial notice of the fact that Dr. Hiltner is a licensed doctor in California, that he saw Mr. Soriano on the date of his merits hearing and treated him for acute gastroenteritis with medication and a recommendation to stay in bed for two days. Such facts fit well into the parameters of the Federal Rules of Evidence as they are "not subject to reasonable dispute" and are clearly "capable of accurate and ready determination by sources whose accuracy could not be reasonably questioned." Dr. Hiltner's status as a registered physician could have been easily confirmed with the Medical Board of California. Further, Dr. Hiltner's statements in his letter regarding Mr. Soriano's emergency could be also be similarly accepted as the accuracy of the source of the information, Dr. Hiltner, could not be reasonably questioned. This letter unequivocally corroborates the information in Mr. Soriano's affidavit submitted in his original Motion to Vacate and clearly establishes that "exceptional circumstances" existed on the day of his merits hearing. The failure of the Ninth Circuit to admit Dr. Hiltner's letter into evidence undoubtedly prejudiced Mr. Soriano's case.

Further, in *Woodby v. INS*, 385 U.S. 276, 286 (1966), this Court held that an alien may not be removed without clear, unequivocal and convincing evidence as to his removability. *Id.* If this Court fails to remedy these clear violations of Mr. Soriano's Constitutional right to due process, Mr. Soriano will

be further prejudiced as he will be removed from the United States without this clear, unequivocal and convincing evidence as to his removability. Moreover, Mr. Soriano will be removed without being able to present the merits on his application for cancellation of removal that he would be have entitled to if the Immigration Judge would have continued his merits hearing or reopened his removal proceedings after the filing of the Motion to Vacate.

Mr. Soriano has been prejudiced repeatedly since the Immigration Judge entered an order for *in absentia* deportation by the Immigration Judge, the BIA and the Ninth Circuit. This Court must step in and remedy the clear Constitutional violations that have prejudiced Mr. Soriano in order to prevent grave injustice and the permanent separation of a husband from his wife and a father from his children.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Felipe Soriano

Felipe Soriano-Arellano

Date: 02/17/2010

APPENDIX A

Filed
Nov 19 2009
Molly C. Dwyer, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FELIPE SORIANO-ARELLANO,
Petitioner,
v.
ERIC H. HOLDER, Jr., Attorney General,
Respondent.

No. 08-71408
Agency No. A077-082-029
ORDER

Before: WARDLAW, FISHER and BERZON, Circuit Judges.

This is a petition for review of the Board of Immigration Appeals' (BIA) order denying petitioner's motion to reconsider and reopen.

We review for abuse of discretion the BIA's denial of a motion to reconsider or motion to reopen. *Perez v. Mukasey*, 516 F.3d 770, 773 (9th Cir. 2008); *Lara-Torres v. Ashcroft*, 383 F.3d 968, 972 (9th Cir. 2004), *amended by* 404 F.3d 1105 (9th Cir. 2005).

An alien who is subject to a final order of removal is limited to filing one motion to reopen removal proceedings, and that motion must be filed within 90 days of the date of entry of a final order of removal. 8 U.S.C. § 1229a(c)(7)(A), (C)(i); 8 C.F.R. §

1003.2(c)(2). Because petitioner's motion to reopen was filed beyond the 90-day deadline, and petitioner has not established that equitable tolling applies, the BIA did not abuse its discretion in denying petitioner's untimely motion to reopen. *See id.*

An alien who is subject to a final order of removal is limited to filing one motion to reconsider that decision, and the motion must be filed within 30 days of the date of entry of a final order of removal. 8 U.S.C. § 1229a(c)(6)(A), (B); 8 C.F.R. § 1003.2(b)(2). Because petitioner's motion to reconsider was filed beyond the 30-day deadline, and petitioner has not established that equitable tolling applies, the BIA did not abuse its discretion in denying petitioner's untimely motion to reconsider. *See id.*

Accordingly, respondent's motion for summary disposition in part is granted because the questions raised by this petition for review are so insubstantial as not to require further argument. See *United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam) (stating standard).

To the extent petitioner contends that the BIA abused its discretion in refusing to reopen proceedings sua sponte, we lack jurisdiction to review this claim. *See Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002). Accordingly, respondent's motion to dismiss in part this petition for review is granted.

Petitioner's motion for permission to file an oversize opposition to the motion to dismiss in part and deny in part this petition for review is granted. All other pending motions are denied as moot.

PETITION FOR REVIEW DENIED in part; DISMISSED in part.

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APPENDIX B

Department of Justice

Executive Office for Immigration Review

U.S. Department of Justice
Executive Office for
Immigration Review
Board of Immigration Appeals
Office of the Clerk
5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Share, Richard Hudson, Esq.
626 Wilshire Blvd., Suite 711
Los Angeles, CA 90017-0000

Office of the District Counsel/LO
606 S. Olive Street, 8th Floor
Los Angeles, CA 90014

Name: SORIANO-ARELLANO, FELIPE

A77-082-029

Date of this notice: 3/4/2008

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

s/

Donna Carr, Chief Clerk

Enclosure

Panel Members:
HESS, FRED

RECEIVED
{Illegible}
Department of Justice
Executive Office for
Immigration Review
{Illegible}

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A77 082 029 – Los Angeles
Date: MAR 4 2008
In re: FELIPE SORIANO-ARELLANO

IN REMOVAL PROCEEDINGS
MOTION

ON BEHALF OF RESPONDENT:
Richard Hudson Share, Esquire
ON BEHALF OF DHS:
Kristin Piepmeier, Assistant Chief Counsel

ORDER:

PER CURIAM. On June 8, 2005, the Board dismissed the respondent's appeal of an Immigration Judge's decision, which denied a motion to reopen an order of removal issued *in absentia*. On April 23, 2007, the United States Court of Appeals for the Ninth Circuit denied the respondent's petition for review. The Ninth Circuit determined that (*Soriano Arellano v. Gonzales*, No. 05-74056, 2007 WL 1188304 (9th Cir. April 23, 2007):

> The BIA did not abuse its discretion in denying Soriano-Arellano's motion to reopen for failure to establish "exceptional circumstances" within the

> meaning of 8 U.S.C. §§ 1229a(b)(5)(C) and 1229a(e)(1). Soriano-Arellano's prescription for medicine for stomach pain and his own declaration that he had a stomach virus and diarrhea do not establish that his illness was "serious" within the meaning of the statute. *See Celis-Castellano,* 298 F.3d at 892 (BIA did not abuse its discretion in concluding that petitioner's evidence, consisting of a declaration and a medical form, failed to establish that his asthma attack amounted to "exceptional circumstances").
>
> Petitioner's argument that the agency applied the incorrect standard and did not consider all of the evidence is not supported by the record.

On November 8, 2007, the respondent filed a motion to reconsider and reopen. The motions are denied as untimely. *See* 8 C.F.R. §§ 1003.2(b)(2) and (c)(2). Further, the respondent has not demonstrated that a regulatory exception applies. *See* 8 C.F.R. § 1003.2(c)(3). The motion and additional evidence does not show a change in country conditions or circumstances, that the additional evidence was previously unavailable, or that another exception such as a joint motion applies.

We decline, moreover, to exercise our sua sponte authority. *See* 8 C.F.R. § 1003.2(a); *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999) (fundamental change in law may warrant *sua sponte* reopening notwithstanding otherwise applicable time and

number limitations on motions); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997)(Board retains limited discretionary power under the regulations to reopen or reconsider only in exceptional circumstances). The respondent's reliance on an unpublished Board decision is misplaced because that decision is not binding, and involves a different alien with different factual circumstances. The respondent has not shown exceptional circumstances or a fundamental change in law so as to warrant *sua sponte* reopening. Accordingly, the motion is denied.

s/
FOR THE BOARD

APPENDIX C

Filed
Apr 23 2007
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FELIPE SORIANO-ARELLANO,
Petitioners,
v.
ALBERTO R. GONZALES, Attorney General,
Respondent.

No. 05-74056
Agency No. A77-082-029
MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted April 16, 2007**

Before: O'SCANNLAIN, GRABER, and CLIFTON, Circuit Judges.

---

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Felipe Soriano-Arellano, a native and citizen of Mexico, petitions for review of the Board of Immigration Appeals' ("BIA") order affirming an immigration judge's decision denying his motion to reopen removal proceedings conducted *in absentia*. We have jurisdiction under 8 U.S.C. § 1252. We review for abuse of discretion, *Celis-Castellano v. Ashcroft*, 298 F.3d 888, 890 (9th Cir. 2002), and we deny the petition for review.

The BIA did not abuse its discretion in denying Soriano-Arellano's motion to reopen for failure to establish "exceptional circumstances" within the meaning of 8 U.S.C. §§ 1229a(b)(5)(C) and 1229a(e)(1). Soriano-Arellano's prescription for medicine for stomach pain and his own declaration that he had a stomach virus and diarrhea do not establish that his illness was "serious" within the meaning of the statute. *See Celis-Castellano*, 298 F.3d at 892 (BIA did not abuse its discretion in concluding that petitioner's evidence, consisting of a declaration and a medical form, failed to establish that his asthma attack amounted to "exceptional circumstances").

Petitioner's argument that the agency applied the incorrect standard and did not consider all of the evidence is not supported by the record.

PETITION FOR REVIEW DENIED.

APPENDIX D

Department of Justice

Executive Office for Immigration Review

U.S. Department of Justice
Executive Office for
Immigration Review

Board of Immigration Appeals
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Share, Richard Hudson, Esq.
626 Wilshire Blvd., Suite 711
Los Angeles, CA 90017-0000

Office of the District Counsel/LO
606 S. Olive Street, 8th Floor
Los Angeles, CA 90014

Name: SORIANO-ARELLANO, FELIPE

A77-082-029
Date of this notice: 06/08/2005

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,
s/
Frank Krider
Chief Clerk

Enclosure

Panel Members: OSUNA, JUAN P.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A77 082 029 – Los Angeles
Date: JUN 8 2005
In re: FELIPE SORIANO-ARELLANO

IN REMOVAL PROCEEDINGS
APPEAL

ON BEHALF OF RESPONDENT:
Richard Hudson Share, Esquire
ON BEHALF OF DHS:
Julia Chimarusti, Assistant Chief Counsel

CHARGE:
Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] – Present without being admitted or paroled

APPLICATION: Reopening

The respondent appeals the Immigration Judge's decision, dated September 20, 2004, denying the respondent's motion to reopen an in absentia order of removal. The appeal will be dismissed.

On appeal, the respondent asserts that the Immigration Judge erroneously denied his motion t

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reopen because the respondent established that he failed to appear for his immigration hearing due to exceptional circumstances. Specifically, the respondent claims that he had stomach pains and was unable to attend his hearing.

An order of removal entered in absentia or in removal proceedings pursuant to section 240(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5), may be rescinded only upon a motion to reopen filed within 180 days after the date of the order or removal, if the alien demonstrates that failure to appear was because of exceptional circumstances as defined in section 240(e)(1) of the Act. *See* 8 C.F.R. § 1003.23(b)(4)(ii). The term "exceptional circumstances" refers to exceptional circumstances (such as serious illness of the alien or serious illness or death of the spouse, child or parent of the alien, but not including less compelling circumstances) beyond the control of the alien. *See* section 240(e)(1) of the Act; *see also Matter of B-A-S-*, 22 I&N Dec. 57 (BIA 1998); *Matter of J-P-*, 22 I&N Dec. 33 (BIA 1998). Additionally, the alien is required to demonstrate that reopening is warranted on the basis of exceptional circumstances. *See Celis-Castellano v. Ashcroft*, 298 F.3d 888 (9th Cir. 2002).

In this case, the Immigration Judge found that the respondent presented insufficient evidence to establish the existence of an exceptional circumstance. We find no error with the Immigration Judge's conclusion. The medical note from the respondent's doctor fails to provide sufficient details to establish that the respondent's illness was serious enough to constitute an exceptional circumstance.

The medical note merely indicates that the respondent was prescribed some medication for stomach pain. The medical note does not indicate the severity of the illness or whether the respondent was ordered to remain in bed during his hearing. *See Celis-Castellano v. Ashcroft, supra* (the court held that the Board did not error when it found that the medical records the alien submitted failed to establish that the alien's illness constituted an exceptional circumstance). Moreover, the respondent failed to present any evidence that he diligently attempted to contact the Immigration Court prior to the hearing. *Id.* Accordingly, we find that the insufficiency of the evidence supports the Immigration Judge's conclusion.

ORDER: The appeal is dismissed.

s/
FOR THE BOARD

APPENDIX E

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Los Angeles, California

File A 77 082 029 September 20, 2004

In the Matter of)
FELIPE SORIANO-ARELLANO,)
Respondent)

IN REMAND & REMOVAL PROCEEDINGS

Charge:
Application:
On Behalf of Respondent: On Behalf of DHS:
, Esquire , Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent appeared or was scheduled for a hearing on September 12, 2003 at 2:30 p.m. in the afternoon. His attorney appeared and the respondent did not appear. We did not know why the respondent had failed to appear; but, later that afternoon his attorney heard from the wife of the respondent who indicated that respondent was in the emergency room. The Government asked that the respondent be removed in absentia because the court had nothing other than that phone call to indicate why the respondent did not appear. So I did order the removal in absentia of the respondent. I indicated that the attorney could file a motion to re-open with

sufficient medical documentation to show why the respondent had failed to appear and I would probably grant such a motion to re-open. However, when the motion to re-open was filed on November 8, 2003, the only medical documentation provided is now tabbed in the file with a yellow flag. It is listed under Exhibit B of the respondent's appeal and all it is is a prescription form from a doctor dated September 12, 2003, showing that some sort of medicine was prescribed for the respondent. It says take three to four tablets for stomach pain. I did not consider this sufficient medical documentation to grant the respondent's motion to re-open so I denied it.

The respondent has now filed an appeal of that denial and this is the decision on that appeal or on the motion to re-open. I am once again denying the motion to re-open because I do not believe that the respondent submitted sufficient medical documentation for me to grant the motion to re-open and I do not believe that his subsequent submission of medical documentation is sufficient. So my decision remains the same.

This tape should be transcribed with copies to both parties and the file returned to the Board of Immigration Appeals for decision on the appeal.

_____

John D. Taylor
Immigration Judge

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CERTIFICATE PAGE

I hereby certify that the attached proceeding before JOHN D. TAYLOR in the matter of:

FELIPE SORIANO-ARELLANO
A 77 082 029
Los Angeles, California

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

s/
Annette M. Spriggs
(Transcriber)

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881-3344

November 12, 2004
(Completion Date)

APPENDIX F

Department of Justice

Executive Office for Immigration Review

U.S. Department of Justice
Executive Office for
Immigration Review

Board of Immigration Appeals
Office of the Clerk
5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Share, Richard Hudson, Esq.
626 Wilshire Blvd., Suite 711
Los Angeles, CA 90017-0000

Office of the District Counsel/LO
606 S. Olive Street, 8th Floor
Los Angeles, CA 90014

Name: SORIANO-ARELLANO, FELIPE

A77-082-029
Date of this notice: 08/17/2004

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,
s/
Frank Krider
Acting Chief Clerk

Enclosure

Panel Members:
MOSCATO, ANTHONY C.

RECEIVED
AUG 26 2004
Department of Justice
Executive office for
Immigration Review
Immigration Court
Los Angeles,
California

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A77 082 029 – Los Angeles
Date: AUG 17 2004
In re: FELIPE SORIANO-ARELLANO

IN REMOVAL PROCEEDINGS
APPEAL

ON BEHALF OF RESPONDENT:
Richard H. Share, Esquire
ON BEHALF OF DHS:
Julia Chimarusti, Assistant Chief Counsel

APPLICATION: Reopening

The respondent has appealed the Immigration Judge's decision to deny his motion to reopen. We have jurisdiction over this matter pursuant to 8 C.F.R. § 1003.2. The record is remanded.

The record reflects that on February 11, 2000 an Immigration Judge ordered the respondent's removal from the United States because she failed to appear for her hearing. The respondent filed a motion to reopen with the Immigration Judge on March 13, 2000, but that request was denied. This timely appeal followed.

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In considering this appeal, we note our decision in *Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994). Therein, we indicated that when a motion to reopen deportation proceedings is denied, the Immigration Judge must identify and fully explain the reasons for such decision; otherwise, the parties are deprived of a fair opportunity to contest the immigration judge's determination on appeal, and the Board is unable to meaningfully exercise its responsibility of reviewing the decision in light of the arguments advanced on appeal. *See generally also Matter of A-P-*, 22 I&N Dec. 468 (BIA 1999). The Immigration Judge's decision lacks specificity, and fails to provide his reasoning for denying the respondent's motion.

Accordingly, we find it necessary to remand the record for inclusion of an appropriate decision by the Immigration Judge. The respondent and the DHS should be served with a copy of the decision and should thereafter be given an opportunity to submit briefs in accordance with the regulations. The record should then be forwarded to the Board for further consideration.

ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion.

s/
FOR THE BOARD

APPENDIX G

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LOS ANGELES, CA

In the Matter of: File A77-082-029
SORIANO-ARELLANO, FELIPE
Respondent

In REMOVAL Proceedings

Order and Summary Decision
Motion to Reopen and/or Reconsider

Upon reading and considering Respondent's Motion to Reopen deportation proceedings, any opposition of the Immigration Service, and upon reviewing the Record of Proceedings in this matter; the Court finds that:

_____ Respondent has failed to comply with 8 C.F.R. 103.5.

_____ Respondent has failed to comply with 8 C.F.R. 242.22.

_____ Respondent has failed to establish prima facie eligibility for the relief sought pursuant to INS v. WANG, 450 U.S. 139, 141 (1981).

X Respondent has failed to persuade the Immigration Judge that the Motion to Reopen should be granted in the exercise of discretion.

Therefore,
IT IS ORDERED that Respondent's Motion to Reopen be and the same is hereby DENIED.

IT IS FURTHER ORDERED that _____

_____

Date: Dec 15, 2003

s/
JOHN D. TAYLOR
Immigration Judge 7U